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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In re Application of)
HEALDSBURG BROADCASTING, INC.) File No. BPH-910211MB
For a Construction Permit)
For a New FM Station on)
Channel 240A)
Healdsburg, California)

To: Chief, Mass Media Bureau

REPLY TO OPPOSITION TO MOTION TO DISMISS

Beckwith Communications, Inc., by counsel and pursuant to Commission Rule Section 1.45 replies to the Opposition to Motion to Dismiss filed by Healdsburg Broadcasting, Inc. ("Healdsburg"). In support, the following is respectfully submitted:

I. Introduction.

1. The above captioned application and five other mutually exclusive applications appeared on Public Notice as accepted for tender May 2, 1991. On September 27, 1991, Healdsburg filed a Petition for Leave to Amend and Amendment ostensibly pursuant to Rule Section 1.65. The Amendment, which was not accompanied by a certificate of service on all mutually exclusive applicants, appeared on Public Notice October 7, 1991. On October 18, 1991, Beckwith filed its Opposition to Petition for Leave to Amend and Motion To Dismiss ("Opposition and Motion").

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II. Healdsburg's procedural objections to Beckwith's Motion to Dismiss must be rejected.

A. The Motion was timely filed.

2. In its Opposition, Healdsburg asserts that because its Petition for Leave to Amend was filed with the Secretary's office on September 27, 1991, any responsive pleading should have been filed by October 7, 1991. (See Opposition at 1-2.) Although this date might control if Healdsburg had properly served all parties in this restricted application proceeding, as required by Sections 1.47 and 1.1202 et. seq.,¹ the only means by which the applicants in this proceeding could have received notice of the Petition for Leave to Amend is the Public Notice released October 7, 1991. Beckwith's response was due on October 18, 1991,

¹ Section 1.1202(a) defines a "presentation" as "any communication directed to the merits or outcome of a proceeding." Subsection (b) defines an *ex parte* presentation as "any presentation made to decision-making personnel but, in restricted proceedings, any presentation to or from decision-making personnel, which (1) if written, is not served on the parties to the proceeding." Subsection (c) defines "decision making personnel" as any member, officer or employee of the Commission who is or may reasonably be expected to be involved in the decisional process in the proceeding.

, Section 1.1208(c) defines "restricted proceedings." Particularly applicable is subsection 1.1208(c)(1)(i)(C), which states that a proceeding is restricted if public notice has been released apprising the public of the filing of a mutually exclusive application.... The term "public notice" as used in this subsection means the public notice issued at regular intervals listing all applications and major amendments tendered for filing.

Clearly, a Petition for Leave to Amend directed toward the Bureau, but not served on all mutually exclusive applicants qualifies as an ex parte communication, which should be stricken, without consideration.

calculating the days as provided in Rule Section 1.4.² Beckwith's response was, therefore, timely filed.

B. Beckwith did not improperly combine an opposition to Healdsburg's Petition for Leave to Amend with its Motion to Dismiss Healdsburg's application.

3. Healdsburg argues that the Opposition and Motion are improperly joined in one pleading. In support of this argument, Healdsburg selectively and deceptively quotes Rule Section 1.44(c) and (d). Specifically, Healdsburg quotes Rule Section 1.44(c) and (d) as stating:

[R]equests requiring action by the delegated authority "not be combined" and that such "pleadings which combine requests ... be returned without consideration." (See Opposition at 2.)

This creative paraphrasing materially mischaracterizes the mandate of Section 1.44. Rule Section 1.44 addresses multifarious pleadings which are addressed to different persons or delegated authorities. A complete reading of the relevant sections reveals:

(c) Requests requiring action by any person or persons pursuant to delegated authority shall not be combined in a pleading with requests for action by any other person or persons acting pursuant to delegated authority.

(d) Pleadings which combine requests in a manner prohibited by paragraphs (a), (b) or (c) of this section may be returned without consideration to the person who filed the pleading.

(Emphasis added.) This rule section clearly allows multiple requests to the same delegated authority, particularly when one

² The date of the Public Notice was October 7, 1991. Since that date was before the abolition of the "day after the day" rule, the actual date of "Public Notice" was October 8, 1991. (See Computation of Time, 6 FCC Rcd 4797 (1991).)

requested action is the natural result of the first requested action. The request for dismissal of Healdsburg's application is the natural consequence of denial of the Petition for Leave to Amend. The two requests were therefore properly combined. Severance into separate pleadings would have wasted Commission resources and delayed resolution of this matter. Healdsburg has cited no case law to support its strained interpretation of this rule. Indeed, what case law there is on this point, supports acceptance and consideration of Beckwith's responsive pleading.³

**III. Healdsburg's amendment may not
cure its defective application.**

4. Healdsburg's Opposition tries to confuse what its Amendment did beyond comprehension. The Petition for Leave to Amend, however, stated very clearly why the Amendment was filed:

The attached Amendment, reports a calculation error in the Section V-B engineering portion of the application by which applicant's engineer calculated the distance contours incorrectly using the Height of Radiation Center Above Average Terrain instead of the Height Above Mean Sea Level. Using the latter correct figure enlarges pertinent contours and requires modification of the applicant's directional antenna to limit radiation towards KKHI-FM [San Francisco] to protect it for a short-spaced requirement of 8 kilometers in accordance with Sections 73.207 and 73.215 of the Commission's Rules.

See Petition for Leave to Amend, at 1. Admittedly, then, Healdsburg's application, as originally filed, failed to protect

³ See Wabash Valley Broadcasting Corp., 18 Rad. Reg. (P&F) 559 (1959) (request for order requiring an applicant to elect between co-pending applications may be made by opposition pleading and is not required to be made in a separate pleading). See also Charles County Broadcasting Co., Inc., 24 Rad. Reg. (P&F) 1153 (Rev. Bd. 1963).

adequately KKHI-FM, in violation of Rule Sections 73.207 and 73.215.

5. This is not a case of first impression for the Bureau. This is a routine "hard look" case involving such a gross engineering error, that it resulted in an application which does not adequately protect a short-spaced existing facility. Healdsburg's engineering showing employed admittedly erroneous figures which incorrectly indicated that the proposal met the technical requirements of both Sections 73.207 and 73.215. The proposed amendment does not merely correct the mistake (which is apparent from a critical review of the application), but through this Amendment, Healdsburg further proposed to modify its directional antenna so that the proposal now no longer impermissible fails to protect adequately the short spaced Station KKHI-FM.⁴ Thus, the application was defective when filed and was therefore unacceptable for filing.

**IV. Healdsburg has not shown good cause now
to amend to cure its defective application.**

8. Responding to Beckwith's showing that Healdsburg had made no showing of good cause to support acceptance of its curative amendment, Healdsburg now belatedly tenders a showing purporting to

⁴ See also Beth Knight, 5 FCC Rcd 3927, 3928-3929 (Audio Ser. Div. 1990), Playa del Sol Broadcasters, 5 FCC Rcd 7606 (Audio Ser. Div. 1990), citing Star Signal Corporation, 1 FCC Rcd 450 (1986) and Hillebrand Broadcasting, Inc., 1 FCC Rcd 419 (1986). Cf. Leibensperger FM, Inc., 6 FCC Rcd 708 (ASD 1991) aff'd sub nom SBM Communications, Inc., 6 FCC Rcd _____ (Rev. Bd. 1991); Minnesota Christian Broadcasters, Inc., 5 FCC Rcd 3337 (Audio Ser. Div. 1990).

prove cause for acceptance of the curative amendment claiming it acted with diligence and that the amendment was not required by its voluntary act. Healdsburg's claim of good cause must be rejected.

9. Preliminarily, since Healdsburg has admitted that its application as filed and using correct calculations, failed to protect short-spaced Station KKHI-FM. As such, the application was not acceptable for filing and was subject to dismissal as patently defective. As a patently defective application, good cause or not, the "hard look" procedures simply do not allow amendment following the expiration of the 30 day period triggered by issuance of a public notice accepting the application for tender, except in specifically defined limited circumstances, none of which are applicable here. See Processing of FM Construction Permit Applications, 5 FCC Rcd 990 (1990). Since the amendment at issue here was filed after the expiration of the tenderability period, even if Healdsburg had shown good cause, its application would still have to be dismissed.

10. Nevertheless, the Commission need not even reach that point, because even given its belated attempt to show good cause for acceptance of its curative amendment, Healdsburg has failed to show good cause. Proof of good cause to accept a late amendment to a mutually exclusive application requires consideration of a six point test, (1) that the applicant acted with due diligence, (2) that the amendment does not result from the voluntary act of the applicant, (3) that the amendment will not require modification or enlargement of the issues, (4) that the amendment will not disrupt

the course of the proceeding, (5) that the amendment will not prejudice any party to the proceeding, and (6) that the amendment will not afford the applicant a comparative advantage. See Erwin O'Connor Broadcasting Company, 22 F.C.C.2d 140 (Rev. Bd. 1970).

15. Healdsburg attempts to show its diligence in tendering the amendment because it states that it filed its amendment to correct its mistake and to modify its technical proposal to protect Station KKHI-FM soon after its consulting engineer found that the application had been erroneously prepared. That its engineer waited several months following the expiration of the amendment of right period to verify his calculations, hardly indicates that the applicant acted with due diligence. A duly diligent applicant would have taken steps to ensure its proposal was correct prior to the expiration of the period for the filing of curative amendments. That, after all, is the purpose for having a period in which to file curative amendments. Hence, Healdsburg's claim that it acted with diligence to correct its proposal must be rejected.

16. Healdsburg's claim that the amendment did not result from its voluntary act is even more tenuous. In United Public Broadcasting, Co., Inc., 57 Rad. Reg. 2d (P&F) 1605 (1985), the applicant similarly sought to amend its application after the amendment of right window had closed. It sought to make its good cause showing, in part stating that the amendment was the result of an error made by its consulting engineer. It argued that its engineer's error should not reflect adversely upon it. In response, the Commission made clear:

It is our long-standing practice . . . to hold applicants themselves responsible for compliance with our rules and to reject all efforts to shift responsibility to others.

See e.g., WHW Enterprises, Inc. v. FCC, No. 83-2067 (DC Cir. Feb. 5, 1985); 220 Television, Inc., 81 FCC 2d 575 (1980); Continental Broadcasting, Inc. 15 FCC 2d 120 (1968). Were we to hold otherwise in the administration of our cut off rules, we would face one of two choices: (1) to waive these rules whenever a tardy applicant claimed reliance on professional advice as an excuse, or (2) to evaluate the competence of each individual practitioner to determine on a case-by-case basis whether the error was of a nature justifying waiver. Both approaches are clearly untenable....⁵

14. The engineering portion of an application is within the applicant's control. Healdsburg's attempt to shift the blame to its consulting engineer is unavailing, as the Commission has long since determined that the applicant is responsible for its application as certified and submitted. Healdsburg is ultimately at fault for relying on its engineer's incorrect calculations. Therefore, it cannot be said that its defective application did not result from its voluntary act.

15. Healdsburg also fails to meet the other applicable tests for the six point good cause showing. Its amendment coming at this late stage in the processing of these applications is clearly disruptive of the proceeding since it would require the staff to restudy its application to determine whether the amended technical showing is acceptable.⁶ Moreover, since Healdsburg admits that its

⁵ United Public Broadcasting Co., Inc., 57 Rad. Reg. 2d (P&F) at 1606.

⁶ Of course, the staff would also have to restudy the original proposal using the correct Height of Radiation Center Above Average Terrain to determine whether the application was originally acceptable for filing. However, since Healdsburg has admitted that it was not,

coverage contours would increase as a result of acceptance of its proposed amendment, Healdsburg cannot rationally claim that other applicants would not be prejudiced by acceptance of its proposal or that it will not accrue a comparative advantage by acceptance of the amendment.⁷

16. Recently, the Review Board considered a situation in which the applicant attempted to circumvent the strenuous "hard look" processing procedures through submission of a §73.3522 amendment. In SBM Communications, Inc., FCC 91R-96, 6 FCC Rcd ____ (Rev. Bd. November 6, 1991) the Board specifically declined the temptation to loosen the "hard look" standards:

Although the "hard look" processing procedures did not alter the standards for acceptance of post-designation amendments, the policy and precedent associated with the "hard look" necessarily affect the good cause analysis to which post-designation amendments are subject, since otherwise the acceptance of post-designation amendments would undermine the benefits of "hard look."

(Emphasis in original.) Healdsburg's application, as originally filed, is defective. Healdsburg's proffered amendment cannot be accepted under §§1.65 or 73.3522, as the "hard look" processing guidelines prohibit such action. Further, Healdsburg fails

that admission by itself should be sufficient to dismiss its application as unacceptable for filing.

⁷ In this connection, Healdsburg does claim that it will not obtain a comparative advantage because each of the other remaining competing applications covers more population than its amended proposal would cover. That argument fallaciously ignores that as a result of the acceptance of its amendment, its coverage deficiency vis-a-vis each of the other applicants would be lessened. That is just as much a comparative advantage as if Healdsburg increased its coverage to greater than each of the other applicants.

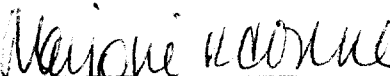
initially in its good cause showing through its own culpability in the error. The amendment cannot be accepted. The application stands defective and must be dismissed.

The foregoing considered, it is respectfully requested that the Petition for Leave to Amend be denied, and that the defective application of Healdsburg Broadcasting, Inc. be dismissed.

Respectfully submitted,

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November 8, 1991

CERTIFICATE OF SERVICE

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